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2018-2-E

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June 26, 2018

\*ALSO ADMITTED IN TEXAS

\*\*ALSO ADMITTED IN WASHINGTON, D.C.

\*\*\*ALSO ADMITTED IN CALIFORNIA

\*\*\*\*ALSO ADMITTED IN NORTH CAROLINA

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk, Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, South Carolina 29201

Re: South Carolina Coastal Conservation League, *et al.* v. South Carolina  
Public Service Commission, *et al.*; Appellate Case No. 2018-001165

Dear Mr. Shearouse:

On behalf of South Carolina Electric & Gas Company ("SCE&G"), enclosed for filing, please find the original and six (6) copies of a Motion To Dismiss Appeal Or, In The Alternative, To Hold Appeal In Abeyance And Memorandum In Support. You will also find enclosed our check in the amount of \$25.00 for the filing fee.

Please acknowledge receipt of the enclosed documents by file stamping the extra copy of same and returning it to me via my courier.

If you have any questions or need additional information, please do not hesitate to contact me.

[SIGNATURE PAGE FOLLOWS]

**RECEIVED**

JUN 28 2018

PSC SC  
MAIL / DMS

Very truly yours,

**WILLOUGHBY & HOEFER, P.A.**



Benjamin P. Mustian

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The Honorable Jocelyn Boyd, Clerk for the SC Public Service Commission

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

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Appellate Case No. 2018-001165

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Commission Docket No. 2018-2-E

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South Carolina Coastal Conservation League and  
Southern Alliance for Clean Energy, .....Appellants,

v.

South Carolina Public Service Commission, South Carolina  
Electric & Gas Company, CMC Steel South Carolina, South  
Carolina Energy Users Committee, South Carolina Solar  
Business Alliance, LLC, Southern Current, LLC, and South  
Carolina Office of Regulatory Staff, .....Respondents;

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**MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE,  
TO HOLD APPEAL IN ABEYANCE AND MEMORANDUM IN SUPPORT**

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Respondent South Carolina Electric & Gas Company ("SCE&G"), pursuant to Rule 240, SCACR, moves this Court to dismiss the appeal filed by the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy on June 21, 2018. Alternatively, SCE&G moves this Court to hold this appeal in abeyance until the Public Service Commission of South Carolina ("Commission") issues its final order ruling on the petitions for rehearing and/or reconsideration filed in Commission

Docket No. 2018-2-E. In support of this motion, SCE&G would respectfully show the following:

1. This matter arises out of Appellants' appeal of a regulatory proceeding, conducted by the Commission pursuant to S.C. Code Ann. §§ 58-27-865 and 58-39-140 (2015) on an annual review of the fuel purchasing practices and policies of SCE&G, for a determination as to whether an adjustment in SCE&G's fuel cost recovery factors is necessary and reasonable, and whether an increase or decrease should be granted in the fuel cost component to recover the incremental and avoided costs incurred by SCE&G to implement a Distributed Energy Resource program.

2. By Order No. 2018-322(A), dated May 2, 2018,<sup>1</sup> the Commission found, among other things, that SCE&G's fuel purchasing practices and policies, plant operations, fuel inventory management, and all other matters associated with S.C. Code Ann. § 58-27-865 (2015) of SCE&G were reasonable and prudent for the applicable. The Commission also found that the methodologies used by SCE&G to calculate its avoided energy and avoided capacity costs under the Public Utilities Regulatory Policies Act of 1978 are reasonable and prudent and that SCE&G's calculation and method of accounting for avoided and incremental costs for Net Energy Metering were reasonable and prudent, were consistent with the approved methodology, and complied with the statutory requirements. In addition, the

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<sup>1</sup> The Commission issued its original order, Order No. 2018-322, on April 30, 2018. This order contained two typographical errors that did not affect the substance of the order. Subsequently, the Commission issued its amended order, Order No. 2018-322(A), which corrected the typographical errors but otherwise was identical to Order No. 2018-322.

Commission approved Base Fuel Cost Components, DER Avoided Cost Components, Variable Environmental & Avoided Capacity Cost Components, and Total Fuel Cost Factors to become effective on and after SCE&G's first billing cycle of May 2018.

3. On May 10 and 11, 2018, Appellants and Respondent South Carolina Energy Users Committee ("SCEUC"), Respondent South Carolina Solar Business Alliance, LLC ("SCSBA"), and Respondent South Carolina Office of Regulatory Staff ("ORS") separately petitioned the Commission to rehear and/or or reconsider its decision in Order No. 2018-322(A) (collectively, the "Petitions for Rehearing").

4. On May 23, 2018, the Commission conducted its regularly scheduled business meeting during which it considered and approved a motion to grant the petition filed by SCEUC, but denied those of Appellants, SCSBA, and ORS. Following its normal practice and procedure, the Commission published a written directive ("Directive") setting forth the language contained in the motion and the results of the subsequent vote. *See* Exhibit A. However, the Commission did not immediately issue and, as of the date of this filing, has not yet issued a formal order memorializing its decision on the Petitions for Rehearing.

5. Instead, and based upon the Commission's practice and procedures and the clear inferences contained in the Directive, it is evident that the Commission intends to issue a more full and complete decision ruling on the Petitions for Rehearing. Specifically, the Directive granted SCEUC's petition, but no final order modifying Order No. 2018-322(A) or otherwise granting such relief has yet been issued, thus indicating the Commission will be issuing an order formalizing its

decision. Furthermore, 10 S.C. Code Ann. Regs. 103-854 provides that “no cause of action shall occur in any court of competent jurisdiction to vacate or set aside any Order of the Commission ... unless a petition for rehearing or reconsideration ... [is] filed with the Commission, and an Order has been issued disposing of the matter.” (Emphasis added).

6. Nevertheless and prior to the Commission’s issuance of a final order on the Petitions for Rehearing, on June 21, 2018, Appellants filed their Notice of Appeal, requesting this Court to review the Commission’s decisions contained in Order No. 2018-322(A) and the Directive.

7. In order to confirm the Commission’s intentions, by letter dated June 21, 2018, a copy of which is attached as Exhibit B, counsel for SCE&G inquired of the Commission Hearing Officer, who was assigned to oversee these matters, whether the Directive constituted the Commission’s final order on the Petitions for Rehearing or whether a more full and complete decision would be forthcoming.

8. On June 22, 2018, the Commission Hearing Officer responded to SCE&G’s inquiry via electronic mail, a copy of which is attached as Exhibit C, stating that “indeed, a more full and complete order on rehearing and reconsideration in this Docket is forthcoming from the Public Service Commission of South Carolina.”

9. As of the date of this filing, the Commission has not issued a final order on the Petitions for Rehearing.

10. Rule 203(b)(6), SCACR, which governs appeals from administrative tribunals such as the Commission, provides:

When a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals, the notice of appeal shall be served on the agency, the administrative law court (if it has been involved in the case) and all parties of record within thirty (30) days after receipt of the decision. If a timely petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion. If a decision indicates that a more full and complete decision is to follow, a party need not appeal until receipt of the more complete decision.

(Emphasis added).

11. Because the Commission has not issued a final order ruling on the Petitions for Rehearing and has indicated that a more full and complete decision is to follow, Appellants' Notice of Appeal is premature and should be dismissed. See Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order, or decision") (emphasis added); S.C. Code Ann. § 58-27-2310 ("No right of appeal accrues to vacate or set aside ... an order of the commission, except an order on a rehearing, unless a petition to the commission for a rehearing is filed and refused or considered refused because of the commission's failure to act within twenty days.") (emphasis added); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20 n. 2, 602 S.E.2d 772, 778 n. 2 (2004) (citing *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature)); *Davis v. Parkview Apartments*, 409 S.C. 266, 277 n.13, 762 S.E.2d 535, 541 n.13 (2014) (noting the Court of Appeals dismissed an appeal as premature).

12. Alternatively, the Court should hold this matter in abeyance until such time as the Commission has issued its final order ruling on the Petitions for Rehearing. Granting such relief will give this Court the benefit of the Commission's analysis of the Petitions for Rehearing and will promote judicial economy by avoiding a review by this Court of a limited, preliminary, and incomplete decision.


WHEREFORE, having fully set forth its motion, SCE&G moves the Court to issue an order dismissing the instant appeal or, in the alternative, holding the appeal in abeyance until such time as the Commission issues a more full and complete order ruling on the Petitions for Rehearing. SCE&G further moves the Court to grant such other and further relief as may be just and proper.

[SIGNATURE PAGE FOLLOWS]



Respectfully submitted,

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*Attorneys for Respondent South Carolina  
Electric & Gas Company*

Columbia, South Carolina  
June 26, 2018

# EXHIBIT A

the proposals of those parties represent fully viable alternatives. Consequently, the parties failed to meet their burden of persuasion to prove to this Commission the reasonableness and viability of any alternatives to SCE&G's proposal.

Several of the parties assert that SCE&G's responses to their discovery requests were insufficient to allow them to prepare evidence by which they might have proposed alternatives to SCE&G's proposed avoided-cost factor. For example, the ORS complains that, "SCE&G failed to cooperate by providing complete and reliable data in a timely manner and, therefore, had the ability to dictate the extent to which other parties could present their cases." Various discovery devices are available to enable a party to gather information to prepare and present evidence in our proceedings. If there were a discovery dispute, the proper mechanism to require a party to provide properly discoverable information is a motion to compel. No party moved to compel discovery in this proceeding. Moreover, this Commission understood that all discovery issues were actually resolved prior to the hearing. For example, by its March 7th filing, the Solar Business Alliance stated that, as a result of the PR-1 and PR-2 and avoided-cost issues being considered as a part of the fuel case, it needed an additional 90 days to prepare its case, or, in the alternative, it requested that the case be continued until the parties had, "ample time to complete discovery requests and report back to the Commission." SBA considered that the issues were too complicated for adequate preparation in the existing timeframe.

In resolution of the Petitioners' shared concerns about adequacy of time for discovery, the parties advised the Commission of an agreement among the parties subsequently approved by the Commission by Directive Order No. 2018-178, issued March 14, 2018 that the company and the parties had resolved their differences as to the procedural schedule in this case. Specifically, they informed the Commission that these issues had been resolved through a commitment from SCE&G to provide discovery responses prior to their due date and to agree to extensions of SBA's prefiled testimony deadlines. Therefore, this Commission issued an order on March 14th approving the parties' settlement resolving SBA's initial request for a 90-day delay.

The parties availed themselves of the concession by SCE&G with the filing of their direct and surrebuttal testimony. Having received the benefit of accelerated discovery production and additional time to file testimony, and this Commission's approval of such a settlement, the parties' position describing a lack of cooperation and time for preparation seems inconsistent with the prehearing representations.

There is a contention by the Solar Business Alliance that using the approved factor from the most recent fuel case should enjoy a presumption of reasonableness and could be adopted as an alternative to SCE&G's proposal. Unlike a mere concept, a previously approved factor has already been litigated. In this case, those Petitioners would have us extract a single element out of a historical fuel factor and ignore the effects of the passage of time and all attendant changing circumstances. Pursuant to South Carolina Code Section 58-27-865(B), the fuel statute's recognition of changing environments and the appropriate and commensurate regulatory response compels us to revisit, reset, and redefine the fuel factors during these annual proceedings. The use of a previously approved factor might be appropriate in the circumstance in which no party had satisfactorily proven its case. That is not the circumstance here.

In Order No. 2018-322(A), this Commission made specific individual findings as to each element of SCE&G's proposed rates and we implicitly or explicitly found the underlying methodology for deriving them to be reasonable. Regarding this subject, SCE&G, upon whom the burden of proof resides, has met its burden.

The Solar Business Alliance would have us use post-hearing compliance filings to fill in

# EXHIBIT B

F. David Butler, Esq.  
June 21, 2018  
Page 2 of 2

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issued a directive ("Directive") granting the petition filed by SCEUC and denying the petitions filed by SCSBA, SCCCL, SACE, and ORS.

Based upon the Commission's practice and procedures and the clear inferences contained in the Directive, it is SCE&G's understanding that the Commission intends to issue a more full and complete decision ruling on the petitions for rehearing or reconsideration. Specifically, 10 S.C. Code Ann. Regs. 103-854 provides that "no cause of action shall occur in any court of competent jurisdiction to vacate or set aside any Order of the Commission ... unless a petition for rehearing or reconsideration ... [is] filed with the Commission, and an Order has been issued disposing of the matter." (Emphasis added). In addition, the Directive granted SCEUC's petition for reconsideration, but no final order modifying Order No. 2018-322(A) or otherwise granting such relief has yet been issued, thus indicating the Commission will be issuing an order formalizing its decision.

SCE&G therefore respectfully requests that the Commission clarify this matter and confirm that a more full and complete decision granting SCEUC's petition and denying the petitions of SCSBA, SCCCL and SACE, and ORS is forthcoming.

By copy of this letter, we are serving all parties of record with a copy of this document. Thank you for your assistance with this matter and if you have any questions, please advise.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

s/Benjamin P. Mustian  
Benjamin P. Mustian

cc: Alexander G. Shissias, Esquire  
Andrew M. Bateman, Esquire  
Richard L. Whitt, Esquire  
Jenny R. Pittman, Esquire  
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Scott Elliott, Esquire  
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Katherine Chiles Ottenweller, Esquire  
Benjamin L. Snowden, Esquire  
Damon E. Xenopoulos, Esquire

276736

Duke, Daphne

From: Butler, David  
Sent: Friday, June 22, 2018 6:08 AM  
To: Benjamin Mustian <[bmustian@willoughbyhoefer.com](mailto:bmustian@willoughbyhoefer.com)>  
Cc: Stark, David <[david.stark@psc.sc.gov](mailto:david.stark@psc.sc.gov)>; Pittman, Jenny <[jpittman@regstaff.sc.gov](mailto:jpittman@regstaff.sc.gov)>; alex@shissiaslawfirm.com;  
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Subject: Re: SCE&G Fuel; SCPSC Docket No. 2018-2-E

Mr. Mustian:

The purpose of this letter is to state that, indeed, a more full and complete order on rehearing and reconsideration in this Docket is forthcoming from the Public Service Commission of South Carolina.

Thanks and Regards,

F. David Butler

Standing Hearing Officer and Senior Counsel

Public Service Commission of South Carolina

Sent from my iPhone

On Jun 21, 2018, at 5:19 PM, Benjamin Mustian <[BMustian@Willoughbyhoefer.com](mailto:BMustian@Willoughbyhoefer.com)> wrote:

Dear Mr. Butler,

Attached please find a letter and certificate of service, which was electronically filed earlier today in the above-referenced docket on behalf of South Carolina Electric & Gas Company. Copies of these documents will be served on the parties via U.S. mail.

Please let me know if you have any questions.

Thank you.

Ben Mustian

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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

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Appellate Case No. 2018-001165

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Commission Docket No. 2018-2-E

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South Carolina Coastal Conservation League and  
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Electric & Gas Company, CMC Steel South Carolina, South  
Carolina Energy Users Committee, South Carolina Solar  
Business Alliance, LLC, Southern Current, LLC, and South  
Carolina Office of Regulatory Staff, .....Respondents.

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**CERTIFICATE OF SERVICE**

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This is to certify that I have caused to be served this day one (1) copy of  
Respondent South Carolina Electric & Gas Company **Motion To Dismiss Appeal  
Or, In The Alternative, To Hold Appeal In Abeyance And Memorandum In  
Support** by placing same in the care and custody of the United States Postal Service  
with first class postage affixed thereto and addressed as follows:

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The Honorable Jocelyn Boyd  
Chief Clerk/Administrator  
**Public Service Commission of South Carolina**  
101 Executive Center Drive  
Columbia, SC 29210  
*(Clerk for South Carolina Public Service Commission)*

  
Sheila Wright

Columbia, South Carolina  
This 26<sup>th</sup> day of June, 2018.